Thus, to the extent that the off-network restriction serves any group at all, it benefits only the most powerful Fox-affiliated or group-owned independent stations in the largest markets. The restriction helps those so-called "independents" who least need the aid, and is therefore unnecessary.

C. Repeal Of The Off-Network Restriction Would Benefit Certain Independent Stations By Allowing Them To Compete Financially for First-Run Syndicated Programming.

Because network affiliates essentially "need" popular first-run programming to air during access more than independent stations do, they are willing to pay more for it. Independents, who legally may air any programming they might choose, nonetheless must sit by as the bidding for popular first-run programming climbs beyond their financial means. The facts are telling: of total clearances for King World programming in the top fifty markets, 98% are on affiliate stations. Like a shotgun marriage, the off-network restriction forces affiliates and King World together, without regard to the programming preferences of the stations themselves.

Ironically, then, the restriction has harmed some independents by preventing them from exercising a full range of programming choice. Removal of the off-network restriction's artificial constraints would restore a market-based equilibrium to prices generally. Some network affiliates would select off-network shows for their access slots, generally causing first-run prices to come down. Some independents would be more likely to air more first-run programs because such shows win high ratings in access periods.

In markets 51-100, just as in the top fifty markets, first-run shows such as "Wheel of Fortune" and "Jeopardy" beat off-network programs. This result holds true even in the rare instances when the station broadcasting the first-run program is an independent like KCOP(TV) in Los Angeles or KTVU(TV) in San Francisco.[73]

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[73] *See Ratings In The Top Markets For The February Sweeps*, Electronic Media, Mar. 14, 1994, at 6. Among the listed examples are the Los Angeles market, where "Star Trek: TNG" run in access on independent KCOP draws more viewers than "Cheers" on independent KTLA; and the San Francisco market, where "Love Connection" on Fox affiliate KTVU draws a larger audience than "Designing Women."

By pushing prices for the top first-run shows out of reach for most independents, the off-network restriction effectively forecloses them from purchasing popular first-run programming to air during the access period. Without question, this consequence was neither intended nor foreseen when the rule was first promulgated. Removal of the off-network component of PTAR would even the playing field for independent stations in competing for first-run programming, and restore choice all around.

D. Independent Stations Do Not Use The Artificial Subsidy Created By The Off-Network Restriction To Subsidize Public-Interest Programming.

In the past, independent and Fox-affiliated stations have intimated that revenue from off-network hits allows them to air public-interest type programs that otherwise would not appear on their schedules.[74] This notion cannot be substantiated.

Independent TV stations have acknowledged that, like all commercial broadcasters, and subject to compliance with FCC requirements, they seek to maximize their audiences and thereby increase the revenue they earn from all programming aired, regardless of daypart or program type.[75] No one disputes that off-network programming can be a lucrative programming choice for independents' and Fox affiliates' access time slots (mainly because they purchase these shows with a proven track record at artificially low rates). Many independents and Fox affiliates have used off-network fare such as situation comedies to successfully "counter-program" against the early evening newscasts running on competing stations.[76]

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[74] *See, e.g.*, Reply Comments of Independent Stations, MM Docket No. 90-162, at 5 (filed Feb. 16, 1994) ("[I]ndependent stations would not be able to produce local news, public affairs, childrens' or other programs if they did not enjoy healthy revenue streams from airing off-network programs during the early evening fringe and access periods.") ("Independents Fin-syn Reply"). But in the same breath, independent stations acknowledged that revenue from off-net shows, "together with the revenue they earn from selling commercial time on first-run and locally produced programs, support independent stations' operations generally and all of their program offerings." *Id.*

[75] *Id.*

[76] *See id.* at 9 ("Independent stations typically try to 'counter-program' the news, magazine-type shows, and game shows usually run by network affiliates during the late afternoon and early evening hours."); INTV Fin-syn Remand Comments at 17 n.51.

But as an economic matter, it would be irrational for an independent station or a Fox affiliate to take "windfall" profits earned from such off-network shows and use them to prop up less popular programming. Although the Commission requires all broadcast licensees to meet certain public interest programming obligations,[77] no commercial station — independent or otherwise — is required to devote time to "noncommercial" or other unprofitable programming. Instead, independents, like all commercial broadcast stations, generally seek to maximize their ratings in each time period, because bigger audiences overall mean more total ad dollars. Thus, an independent would either pocket any off-network-related profits or invest such funds in even more expensive, more popular programming, in the hope of garnering still larger audiences and additional ad dollars.[78]

Certainly this fact does not preclude independent or Fox-affiliated stations from airing a wide range of programming types, including locally produced news or public affairs programs. Like other stations (and, again, subject to FCC mandates), independents air public-interest type programming when it makes financial sense to do so. In local television today, serving the public interest can also serve a station's economic interest. Independent station newscasts have mushroomed in recent years because there is revenue to be earned in delivering what only a local video outlet can provide — local news.[79] As the manager of one independent station explained, "It is clear that news and public affairs programming is tied to profits at a station."[80]

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[77] *See* 47 C.F.R. § 73.3526(a)(8) (1993) (documentation required to demonstrate compliance with obligations regarding "significant treatment of community issues" and "educational and informational" children's programming).

[78] *See* William B. Lilley III and Rudolph G. Penner, *Impact of Advertising on the Competitive Structure of the Media* (1990), *excerpted in* Reply Comments of CBS, Inc., MM Docket No. 90-102, Exh. B, at 1 (filed Aug. 1, 1990). The only means for increasing revenues is to deliver larger audiences to advertisers — and audiences follow quality programming, which costs more money, which requires more advertising revenue, and so on. "The causal linkage of revenues to spending to audience shares is knit closely . . . . The correlations [among the three components] moves in virtual lockstep . . . ." *Id.* at 3. No broadcast entity can long afford to ignore this business reality, whether it is a national network complete with a dozen "O&Os" or a single independent station. *See id.* at 1-2.

[79] *See, e.g.,* Geoffrey Foisie, *Independents Build a New News Image*, Broadcasting, Nov. 16, 1992, at 45 ("Whether Fox affiliates or true independents, those stations with a newscast showed higher news ratings last May, almost across the board, over the prior year's period."); Mike Freeman, *Making the most of more local news; Expanded news coverage provides renewed interest and finances*, Broadcasting,

After an independent or Fox affiliate satisfies its obligations as a licensee, its decision to use station resources for local newscasts and similar community-affairs shows is just one option among many programming choices. Independents themselves have said, "[i]t is not appropriate for the Commission to sit in judgment of the degree to which particular types of programming enhance program diversity."[81] The off-network restriction thus may not be justified by reference to an imagined "cross-subsidy." Elimination of the off-network restriction would not eliminate the clear financial incentive that independents and Fox affiliates have to air news and public-affairs programming. It should therefore be repealed.

III. REPEAL OF THE OFF-NETWORK RESTRICTION WOULD NOT UNDERMINE THE VIABILITY OF FIRST-RUN SYNDICATED PROGRAMMING.

One of the FCC's primary goals in establishing PTAR was to create viable opportunities for first-run syndicated programming. Such programs today draw large audiences in markets of all sizes. Without doubt, first-run programming would continue to thrive in the absence of the off-network restriction.

That assertion has already been tested, and the results are in: even though affiliates of ABC, NBC, and CBS in markets 51-100 are permitted to schedule off-network programs in their access periods, they prefer running first-run shows. Affiliates in the "second fifty" schedule off-network programs in only 29% of all time periods they devote to syndicated fare. First-run programming, conversely, controls 69% of these stations' syndicated programming slots.[82]

Aug. 19, 1991, at 35 ("mounting economic pressures have major market [independent] stations studying the expansion of local newscasts to generate added revenue").

[80] *Independents Raise News Profiles*, Broadcasting, Dec. 31, 1990, at 46 (quoting Al Devaney, general manager of WPWR-TV, a Chicago independent, discussing "the trend" of "doing more news").

[81] Independents Fin-syn Reply at 4.

[82] *Id.*, Appendix at 3.

FIGURE 3

Affiliate Access Programming in Markets 51–100

	# of Half Hours	% of Total	All Program(s)
First-Run Programming	157	69%	Wheel, E.T., Jeopardy, Inside Edition, Current Affair, Hard Copy, American Journal, Family Feud, Love Connection, Highway Patrol
Off-Net Sitcoms	46	20%	Roseanne, Cheers, Empty Nest, Coach, Murphy Brown, Golden Girls, Cosby, MASH, Full House
Off-Fox Programming	17	8%	Married w/Children, Cops
Off-Net (Other)	3	1%	Rescue 911
Off-Syndication	5	2%	Star Trek TNG, Mamma's Family
Total	**228**	**100%**	

Source: NSI, Nov. 93. All 51-100 market affiliates, M-F 700-800P (E.S.T.).

The West Palm Beach market provides a compelling illustration of the attractiveness of first-run programming in a setting unaffected by the off-network restriction. Although West Palm Beach now ranks among the top fifty markets in size, fluctuations in the identity of markets subject to the rule have provided it, for practical purposes, with a temporary exemption from the restriction.[83] From 7 to 8 p.m., the West Palm affiliates of ABC and NBC each air one 30-minute off-network series and one 30-minute first-run series. In both cases, the stations get a higher rating with the first-run program they air than with the off-network program airing during the adjacent half-hour. Note that the order in which the program types air is irrelevant: the NBC affiliate's ratings almost double when it moves from "Cheers" at 7 p.m. to "Jeopardy" at 7:30 p.m., while the ABC affiliate's ratings drops in half when it moves from "A Current Affair" at 7 p.m. to "Coach" at 7:30.

[83] *See* 47 C.F.R. §73.658 Note 1 (1993)(explaining that list of fifty largest markets subject to the rule is revised once every three years to reflect demographic shifts).

FIGURE 4

First-Run vs. Off-Net: West Palm Beach Case Study

		NSI HH Rtg./Shr.	*Sign-On/Sign-Off NSI HH Rtg./Shr.*
M-F 700P			
	WPEC-C Wheel of Fortune	16/28	5/16
Lead-in: NBC News (17/32)	**WPTV-N Cheers (#2)**	**8/14**	**7/23**
	WFLX-F Roseanne	6/11	3/8
	WPBF-A Current Affair	6/10	3/10
	WTVX-I Highway Patrol	1/2	1/2
M-F 730P			
	WPTV-N Jeopardy	15/27	7/23
	WPEC-C Ent. Tonight	9/16	5/16
	WFLX-F Married w/Children	6/11	3/8
Lead-in: Current Affair (6/10)	**WPBF-A Coach (#4)**	**3/6**	**3/10**
	WTVX-1 Empty Next	1/3	1/2

Source: NSI, Nov. 93, Sign-on/Sign-off = Mon.-Sun. 600A-200A.

Even independent stations' own data demonstrate that first-run programs — on the rare occasions when independents can afford to acquire them — permit such stations to beat their independent peers who air off-net shows. In the Commission's 1993 fin-syn proceeding, INTV submitted data showing the "early fringe" schedules and ratings for independents in the top ten markets.[84] For the 7:30-8:00 p.m. time slot, independents in five of those markets were able to acquire first-run half-hour programs such as "Current Affair," "Hard Copy," and "Love Connection."[85] In each of those five markets, those stations beat other independents who aired off-network hits like "Cosby" and "Golden Girls."

And certainly the dominance of King World will continue for the foreseeable future. The first-run market giant has locked up the early fringe and access periods through the year 2000 for "Oprah," "Wheel of Fortune," and "Jeopardy" via long-term contracts.[86] Expected to generate up to $1.9 billion in fees, the fifty agreements assure King World of clearances in 70% of the country.

84 INTV Fin-syn Remand Comments at exh. 1.

85 *See id.* (data for New York, Los Angeles, Philadelphia, San Francisco, and Washington, D.C.).

86 *See, e.g., Syndicators in Fear of NW Daytime Block*, Variety, May 30-June 5, 1994, at 21, 26; *King World locks down big renewals*, Electronic Media, June 6, 1994, at 4.

Stephen Palley, King World's executive vice president and chief operating officer, noted that "the contracts were unusual for both their length and price levels."[87]

But without relief from the off-network restriction, the prospect for the future of off-network syndication is considerably darker. Frank Biondi, president and CEO of Viacom (now the parent company of Paramount) has explained the bottom-line facts behind the deterioration of the off-network syndication business and the increased risk for network prime-time producers today. As he put it, "[i]f you do ten shows and only two get to full syndication with one getting $1 million an episode and the other only $500,000 and the other eight have between thirteen and forty-four episodes that you have to absorb the deficit for, it doesn't add up."[88]

◆ ◆ ◆

The PTAR off-network restriction is no longer needed. Moreover, it actually hampers stations' ability to select the access programming best suited to their viewers. Even the single party which arguably has benefited most from the restriction agrees that modification of PTAR would not harm the first-run marketplace. Two years ago, King World's Stephen Palley said that "[i]f [PTAR] were to change, we don't think there would be any significant impact on our shows."[89] Clearly, then, there is no justification for retaining a restriction that does nothing but burden the producers of prime-time programs, the three established networks, their affiliated stations and, ultimately, the viewing public.

CONCLUSION

The PTAR off-network restriction fails to serve the Commission's original goal of fostering diversity. Rather, the rule constricts — through law or economic impact — the ability of both regulated affiliates and independents to choose programming they may wish to provide to

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87 *King World Reaches Pacts On TV Shows*, Wall St. J., June 6, 1994, at A7.

88 *Viacom chief looks at changes in a tough year*, Electronic Media, Dec. 21, 1992, at 1.

89 Oppenheimer's Media and Entertainment Conference Transcript 46 (1992). By locking in programming deals through the year 2000, King World has just guaranteed that Palley's observation will become true.

their audiences. Instead of fostering a wide variety of programming sources, the restriction has served only to entrench three companies as purveyors of 93% of all first-run programs aired during the regulated access time slots. Finally, by artificially segmenting the access programming market so as to reduce off-network syndication revenue, the restriction threatens the quality of prime-time programming produced for ABC, CBS, and NBC.

There is no longer any need for government intervention in today's television environment. First-run programming is solidly established in the marketplace. The time has come for all stations to be allowed to choose the programming that the broadcasters believe best serves their audiences. Thus, the Commission would act in the public interest by repealing the off-network restriction.

Respectfully submitted,

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ATTACHMENT A

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OTHERS

David Babcock Productions

Burnham Broadcast Company

WALA-TV (NBC)	Mobile, AL
WLUK-TV (NBC)	Green Bay, WI
WBAK-TV (ABC)	Bakersfield, CA
WVUE-TV (ABC)	New Orleans, LA
KHON-TV (NBC)	Honolulu, HI

Mark Brull

Heartfelt Productions, Inc.

Hubbard Broadcasting

KSTP-TV (ABC)	Minneapolis, MN
KSAX(TV)(ABC)	Alexandria, MN
WDIO-TV (ABC)	Duluth, MN
WIRT(TV)(ABC)	Hibbing, MN
KRWF(TV)(ABC)	Redwood Falls, MN
KOB-TV (NBC)	Albuquerque, NM
KOBF(TV)(NBC)	Farmington, NM
KOBR(TV)(NBC)	Roswell, NM
WTOG(TV)(Ind.)	St. Petersburg, FL

Gary Jacobs

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* Credentials are listed for identification purposes only.

KVOA Communications, Inc.

Larry Levin

Mantissa Productions, Inc.

Providence Journal Company

WHAS-TV (ABC)	Louisville, KY
WCNC-TV (NBC)	Charlotte, NC
KMSB-TV (FOX)	Tucson, AZ
KASA-TV (FOX)	Albuquerque/Santa Fe, NM
KING-TV (NBC)	Seattle, WA
KGW-TV (NBC)	Portland, OR
KREM-TV (CBS)	Spokane, WA
KTVB-TV (NBC)	Boise, ID
KHNL-TV (FOX)	Honolulu, HI

Rock Island Productions

John F. Ruby

Scripps-Howard Broadcasting Co.

KNXV-TV (FOX)	Phoenix, AZ
WFTS(TV)(FOX)	Tampa -St. Petersburg, FL
WPTV(TV)(NBC)	West Palm Beach, FL
WMAR-TV (NBC)	Baltimore, MD
WXYZ-TV (ABC)	Detroit, MI
KSHB-TV (FOX)	Kansas City, KS
WCPO-TV (CBS)	Cincinnati, OH
WEWS(TV)(ABC)	Cleveland, OH
KJRH(TV)(NBC)	Tulsa, OK

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 1994, I caused copies of the foregoing "Comments of the Coalition to Enhance Diversity" to be delivered by first-class postage, or by hand [*], to the following:

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